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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 852

GEORGE BACKER, Individually and on behalf of the Citizens, Residents and Voters of the State of New York,

Appellants,

—v.—

NELSON A. ROCKEFELLER,
Governor of the State of New York,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion, including findings of fact and conclusions of law of the District Court has not yet been reported. By agreement of counsel for Joseph A. F. Valenti (*Valenti* v. *Rockefeller,* W.D.N.Y., Civil Action No. 1968-224, a companion case, No. 773) and appellant Backer's attorney, the District Court's opinion submitted with the *Valenti* case pursuant to Rule 15 (1) marked Appendix A, is to be also deemed the appendix to the above entitled matter.

Nature of the Proceedings

This is an action for: (1) a permanent injunction restraining the Governor of the State of New York from violating the Seventeenth Amendment of the Constitution of the United States;

(2) An order directing the Governor of the State of New York to issue a writ of election setting the date for the election of United States Senator from the State of New York and directing that that election be held at the next general election; and

(3) A judgment declaring §296 of the Election Law of the State of New York to be null and void as a violation of the Seventeenth Amendment to the Constitution of the United States.

The jurisdiction of this Court is conferred by 28 U.S.C. §§1253, 2281 and 2284. *Radford* v. *Gary*, 145 F. Supp. 541 aff'd 352 U.S. 991; *Baker* v. *Carr*, 369 U.S. 186; *Reynolds* v. *Sims*, 377 U.S. 533.

The order of the District Court was entered on November 13, 1968. A Notice of Appeal was filed in the United States District Court for the Southern District of New York on November 27, 1968.

State Statute Involved

The relevant portion of Section 296 of the Election Law of the State of New York, as amended by the terms of Section 191 (a) of the Election Law, reads as follows:

> *United States senators.* — At the general election next preceding the expiration of the term of office of a United States senator from this state, a United States

senator shall be elected by the people for a full term of six years. If a vacancy occur in the office of United States senator from this state in any even numbered calendar year less than sixty days prior to an annual fall [spring] primary election, or thereafter during said even numbered year, the governor shall make a temporary appointment to fill such a vacancy until the first day of December in the next even numbered calendar year. If such vacancy occur in any even numbered calendar year sixty days or more prior to an annual fall [spring] primary election, the governor shall make a temporary appointment to fill such vacancy until the first day of December in such even numbered calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the secretary of state. At the time of filing such certificate, the governor shall issue and file in the office of the secretary of state a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration of the term of such appointment.

Questions Presented

Whether Section 296, as modified by Section 191 (a), of the Election Law of the State of New York violates the provisions of Article 4, Section 4, and the terms of the Seventeenth Amendment, to the Constitution of the United States. The text of the Seventeenth Amendment follows:

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: PROVIDED, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Statement of the Case

1. The Facts.

Senator Robert F. Kennedy of New York died on June 6, 1968 thereby creating a vacancy in the United States Senate. On September 10, 1968 the Hon. Nelson A. Rockefeller, Governor of the State of New York appointed Charles Goodell to fill the vacancy for the unexpired term of Senator Kennedy which would have run until December 31, 1970.

On July 19, 1968 appellants brought suit in the Federal District Court for the Southern District of New York against the Governor under 28 U.S.C., §1343 demanding injunctive and declaratory relief and an order compelling an election to fill the vacancy.

A hearing on the merits of the case was held on August 7, 1968 before Chief Judge J. Edward Lumbard, Chief Judge of the Second Circuit Court of Appeals, Chief Judge John O. Henderson, Chief Judge of the Federal District Court for the Western District of New York (sitting by special temporary assignment in the Southern District of New York for the purpose of hearing and determining the proceedings), and Judge Marvin E. Frankel of the Southern District of New York.[1]

2. The District Court's Decision.

The District Court held that §296 of the New York State Election Law, which permits the Governor to appoint a successor to Senator Kennedy for a period of thirty months, does not violate the Seventeenth Amendment to the United States Constitution (A32).[2]

The Court concluded (A28) that the following state interests were sufficiently substantial to outweigh "a 30-month paralysis [of] the sovereignty of the people proclaimed by the amendment" (A53):

1. Voter turnout is maximum in even numbered years (A15);

2. Candidates have difficulty in financing campaigns in "off-year" elections (A15); and

3. It is inconvenient and expensive to the state to conduct a state-wide election in off-years (A16).

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[1] Two similar suits were brought approximately the same time as this action. One in the Federal District Court for the Western District of New York (*Valenti* v. *Rockefeller*, W.D.N.Y., Civil Action No. 1968-224) and one in the Federal District Court for the Southern District of New York (*Phillips* v. *Rockefeller*, S.D.N.Y., Civil Action No. 1968-2942). The three cases were heard together at the August 7, 1968 hearing.

[2] All references are to Appellants' Appendix A.

The Court further chose to ignore the pertinent legislative history of the amendment. This history consists of explanatory text in a report of the House of Representatives by the author of the Seventeenth Amendment, limiting appointment to one year (A26), and remarks to the same effect on the floor of the Senate during the debate on the Seventeenth Amendment (A27).

The majority opinion also overlooked a provision in the New York State Constitution limiting appointments to fill vacancies in an elective office to fourteen months (A68, 69).

The Questions Are Substantial

Direct appeal from a three-judge federal district court is proper when the constitutional questions are substantial, *Ex Parte Poresky,* 290 U.S. 30. A question is not substantial if this Court previously determined it or it is obviously without merit. *California Water Service Co.* v. *City of Redding,* 304 U.S. 252.

1. No Previous Judicial Interpretation.

This is the first case dealing with the Seventeenth Amendment; it has never been interpreted by any Federal Court ("... no court has previously construed the amendment's vacancy provision", (A20); "... in what appears to be the first judicial scrutiny of the [Constitutional] provision in question" (A52)).

2. Showing of Merit.

Appellants' position has obvious merit. As Judge Frankel stated in his dissent:

> "[This] case appears destined for the Supreme Court, ..." (A80)

The following excerpt from Judge Frankel's dissent speaks most clearly to the substantial question involved herein (A51, 52):

> "The loud, clear, and supreme command of the Seventeenth Amendment is that Senators are to be 'elected by the people * * *.' Though not all change is progress, none of us doubts that this expansion of popular sovereignty was a forward step for a cherished national ideal. But the office of Senator is too important to be left vacant even for brief periods. And so, as a stopgap, in a proviso, the Amendment allows Governors to make 'temporary appointments until the people fill the vacancies by election as the legislature may direct.' According to the defendants, with the approval of my respected colleagues on this court, that proviso is entitled to so expansive a role that nearly half the senatorial term may be occupied by an appointee rather than by a choice of the people."

The majority below held, ". . . the laws of New York do not contravene the powers which the Constitution has given to the State Legislatures, although in the tragic circumstances of Senator Kennedy's death the statutory chronology results in a delay of 29 months before the election of his successor by the people" (A31, 32). The obvious answer to that statement is: Election Delayed is Election Denied!

The Court below delivered two opinions in this case totalling 80 pages, including 30 pages in dissent. The majority opinion alone in 17 pages of appendix examines the history and interpretation in great detail of every state statute relating to the filling of vacancies in the Senate.

Every state has a statute dealing with vacancies in the Senate. The provisions of these statutes vary from requir-

ing an election within one year of the vacancy to permitting a governor to appoint a successor for virtually the entire six-year term (A33 through A49).

The public reaction to the lower court's decision is reflected in a New York Times editorial of November 15, 1968:

"SENATOR GOODELL'S TERM

The Seventeenth Amendment to the Constitution clearly proclaims that United States Senators shall 'be elected by the people. . . .' In the light of this central purpose it is surprising that a Federal court has now ruled (in a split decision) that the unexpired term of the late Senator Robert F. Kennedy can be held by an appointive successor until the election of 1970—nearly 29 months after Mr. Kennedy's death.

It is quite true that the amendment grants state legislatures the right to empower Governors to make temporary appointments until the people can fill the vacancies by election "as the legislature may direct." But it seems highly improbable that there was envisioned a "temporary" appointment lasting for nearly half a complete Senatorial term.

Under New York law as it stood until recent years Senator Kennedy's successor would have been chosen in last week's election. But in 1951 the Legislature provided that Senators could be elected only in even-numbered years, and in 1965 that they must be nominated through a modified direct primary system. The court majority held that these provisions together made it impossible to hold the election in either 1968 or 1969.

• • •

"This is an unprecedented extension of the 'temporary appointive power,' Judge Marvin E. Frankel wrote in his dissenting opinion. He argued that the majority view rested on "a plainly misplaced emphasis" and added:

"But perhaps the most remarkable thing of all is that the revered principle of government 'by the people,' so clearly at the heart of the Seventeenth Amendment, is today subordinated when there is no faint echo of any genuinely countervailing interest, state or Federal, to be furthered in the process."

We agree with Judge Frankel that the right of popular election is more important than technical provisions of the State Election Law. The New York State Constitution provides that state elective offices cannot be filled by appointment for longer than approximately one year. The Court of Appeals has repeatedly said it is the public policy of the state to fill vacancies in elective office at the earliest possible election.

This is sound public policy. *We hope that the United States Supreme Court will decide that the clear intent of the Seventeenth Amendment should prevail over conflicting state laws. If so, it will order the election of a new Senator from New York State to be held next November, rather than a year later."* (Emphasis added.)

The denial of the rights of over 8 million voters (A15) to select their representative in the Senate raises a question of constitutional proportions. *Baker* v. *Carr, supra.* As this Court said in 1964:

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and

any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims, supra,* at 555.

3. Lack of Mootness.

The original complaint sought a judgment holding that §296 of the New York State Election Law is unconstitutional and an order requiring an election for Senator be held on November 5, 1968. This case is not moot because that date is past. The Constitution is still being violated and an early election is required more urgently than ever! The lower court explicitly decided (A7) the question: Does the Seventeenth Amendment prohibit New York from bypassing its general election in 1969 in favor of filling the vacancy in November, 1970? The question was answered in the negative. This Court has never declined to fashion a remedy when a right created under federal law is violated. *J. I. Case* v. *Borak,* 377 U.S. 426, *a fortiori* when the Constitution is being violated this Court should be even more eager to redress the wrong.

Advancement of Oral Argument

This case being an election law case, "time is of the essence." Should this Court note probable jurisdiction, in order for a finding for the appellants to be effective, a decision must be rendered before April of 1969.

In the State of New York, according to §131 of the New York Election Law the state committee selects the candidate for the office of United States Senator. In addition, §131(2)(b)(3) of the New York Election Law states that ". . . the state committee shall also certify each candidate who receives twenty five per cent or more of the total vote cast [at a meeting of the state committee]."

Furthermore any enrolled member of the party may make other designations by petition (§131(b)(4) of the New York Election Law). If more than one candidate is designated, a primary election is prescribed (§131(4)(d) of the New York Election Law).

A candidate who proceeds by way of petition under §131(b)(4) of the New York Election Law must be allowed to circulate his petitions by April of 1969. (§136(5) of the New York Election Law.) It is also imperative that the state committee be apprised of the necessity to convene a meeting at the earliest possible time so that its meeting may be held before the April date for circulating petitions. Thus, in order to facilitate a democratic selection of candidates for the office of United States Senator from New York, a decision must be handed down by this Court before April of 1969. Therefore, request is hereby made that this matter be advanced for oral argument.

CONCLUSION

Appellants respectfully pray that this Court note probable jurisdiction in this case and place the case upon its calendar for argument at an early date.

Dated: December 16, 1968

Respectfully submitted,

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